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SENATE

REPORT
99-109

# PROTECTION AND ADVOCACY FOR MENTALLY ILL PERSONS ACT OF 1985

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JULY 25 (legislative day, JULY 16), 1985.—Ordered to be printed

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Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 974]

The Committee on Labor and Human Resources to which was referred the bill (S. 974), to provide for protection and advocacy for mentally ill persons, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

### BACKGROUND

On April 1-3, 1985, the Senate Labor and Human Resources Subcommittee on the Handicapped, together with the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, held three days of hearings on the care and treatment of institutionalized persons who are developmentally disabled, mentally retarded, or mentally ill. These hearings, chaired by Senator Lowell Weicker, and an accompanying 246-page report (S. Hearing 99-50) represented the culmination of a 9-month staff investigation of conditions in state-operated facilities for the developmentally disabled, mentally retarded and/or mentally ill. In response to his investigation and hearing, on April 23, 1985, Senator Weicker introduced S. 974, entitled the "Protection and Advocacy for Mentally Ill Persons Act of 1985".

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On June 6, 1985, the Subcommittee on the Handicapped reported S. 974 with amendments. On July 10, 1985, the full Committee on Labor and Human Resources unanimously moved to order the bill with an amendment, in the form of a substitute, reported to the Senate.

In 1980, Congress passed the Mental Health Systems Act, P.L. 96-398 to provide more extensive services for the mentally ill. As a part of this Act, Congress developed, among other things, a bill of rights for the mentally ill and a demonstration authority to provide a protection and advocacy system for the mentally ill. The bill of rights provision (Sec. 501) reflects the sense of the Congress "that each state should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require." In 1981, most of the authority under the Mental Health Systems Act (MHSA) was repealed and its programmatic focus transferred to state control under the Alcohol, Drug Abuse and Mental Health Services Block Grant (ADMS) (Title XIX P.H.S.) (P.L. 97-35). However, MHSA Sec. 501, containing the bill of rights, was retained in law. Congress restated its support for the rights of the mentally ill in the ADMS Block Grant, by requiring the provision of services "which are available and accessible promptly, as appropriate and in a manner which preserves human dignity and assures continuity and high quality care" (P.H.S. Sec. 1916(c)(3)(C)).

S. 974, as reported by the Committee, also draws upon the experience gained by the implementation of the Developmental Disabilities Assistance Bill of Rights Act, P.L. 94-103, 42 U.S.C. It established a system which provides for the planning and coordination of services and the protection of rights for persons with developmental disabilities. This program has been most recently reauthorized through FY 1989 by P.L. 98-527.

## Need For Legislation

In the staff investigation of conditions affecting the developmentally disabled, mentally retarded and/or mentally ill in state/operated facilities, staff visited 12 states and 31 facilities. Their findings reflecting needs of these individuals can be summarized as follows:

1. All 31 facilities had written policies and internal advocate systems for responding to allegations of abuse and neglect of residents. However, some internal patient rights advocates said they were unable to investigate complaints adequately for various reasons or that, at times, there was a lack of effective disciplinary action taken against persons known to be abusive to patients. In addition, there appeared to be a need for an advocacy system independent of any service provider.

2. A lack of stable funding sources for advocacy efforts for the mentally ill has an adverse effect on those efforts.

3. While many of the Nation's state psychiatric facilities are subject to review by the private Joint Commission on Accrediation of Hospitals (JCAH) and the Health Care Financing Administration, these external reviews, intended to test a facility's level of care and treatment of the mentally ill, may not be totally sufficient for protecting the mentally ill because they are predictable in their scheduling and more focused on evaluating the capacity of an institution

to provide treatment rather than on the treatment provided to each individual.

4. The limited authority of advocates to investigate certain complaints under state definitions of abuse and neglect is a serious impediment to effective protection of patients.

5. It is estimated that approximately 400,000 persons (both mentally ill and mentally retarded) reside in institutions throughout the country.

Advocacy for the mentally ill remains a key concern of the Congress and the federal Executive Branch for the following reasons:

—Language reauthorizing the ADMS Block Grant in 1984 (P.L. (98–509) mandates that the Alcohol, Drug Abuse and Mental Health Administration (DHHS) provide States technical assistance to assist in providing quality care to mentally ill individuals (S. Rept. 98–381).

—The federal government continues to provide funding for state protection and advocacy agencies for developmentally disabled persons, including such persons who are also mentally ill.

The findings of the Senate staff investigation, testimony presented at the hearing, a perception of need for further attention at the state and local levels to affirm and enforce the rights of the mentally ill, and other reasons cited, indicate a need for expanding the advocacy efforts available to mentally ill persons in residential facilities. Because of the past accomplishments of the Developmentally Disabled Protection and Advocacy System, the Committee has chosen to utilize this system in effectuating the goal of this legislation.

## II. Section-by-Section Summary

The provisions summarized below are from the Protection and Advocacy for Mentally Ill Persons Act of 1985. This is new legislation and is not an amendment of an existing statute, except section 4 (Bill of Rights) which is a redesignation of title V of the Mental Health Systems Act.

S. 974 consisits of seven sections:

—Section 1 provides that this Act may be cited as the Protection and Advocacy for Mentally Ill Persons Act of 1985.

—Section 2 presents congressional findings and the purposes for which the bill was developed.

—Section 3 sets forth definitions of the major terms used in the Act.

—Section 4 includes the Bill of Rights as previously set forth in the Mental Health Systems Act.

—Section 5 includes all the provisions regarding establishment and operation of the proposed protection and advocacy system for mentally ill persons.

—Section 6 is a technical amendment which repeals title V of the Mental Health Systems Act.

—Section 7 states that the Act is to take effect on October 1, 1985.

SECTION 2—FINDINGS AND PURPOSES

Subsection (a) states the congressional findings that mentally ill persons are subject to abuse and neglect and that State systems for monitoring compliance with established rights of such persons are frequently inadequate.

Subsection (b) sets forth the purposes of the Act which are: (1) to ensure that the rights of mentally ill persons are protected, and (2) to assist the States to establish and operate protection and advocacy systems for mentally ill persons.

SECTION 3—DEFINITIONS

Subsection (a)(1) defines "abuse" to mean any act or failure to act by an employee of a residential facility which was performed knowingly, recklessly or intentionally, and which caused, or may have caused, physical injury to a mentally ill person. The term includes acts such as rape or sexual assault, striking, use of excessive force, and the use of bodily or chemical contraints not in compliance with Federal and State laws and regulations.

Subsection (a)(2) defines "eligible system" to mean the protection and advocacy system established in each State under part C of the Developmental Disabilities Assistance and Bill of Rights Act.

Subsection (a)(3) defines "mentally ill person" to mean an individual for whom a primary diagnosis of mental illness has been made and who resides for 24 hours each day in a residential facility.

Subsection (a)(4) defines "neglect" to mean a negligent act or omission by any person responsible for providing services in a residential facility which may have caused physical or mental injury or which places mentally ill persons at risk of such injury. The term includes the failure to implement an individual program plan; failure to provide adequate nutrition, clothing or health care; and the failure to provide a safe environment.

Subsection (a)(5) defines "Secretary" to mean the Secretary of Health and Human Services.

Subsection (b) prohibits the Secretary from promulgating regulations to define the terms "mentally ill person" and "residential facility" for purposes of this Act.

SECTION 4—BILL OF RIGHTS

Section 4 is a redesignation of title V of the Mental Health Systems Act, Public Law 96-398, enacted on Octobver 7, 1980. There were no changes made in the language of the Bill of Rights; it was simply transferred from the Mental Health Systems Act to this Act.

SECTION 5—PROTECTION AND ADVOCACY SYSTEM

Subsection (a) provides that the eligible system may apply for an allotment each year to protect and advocate the established rights of mentally ill persons and to investigate reported incidents of abuse and neglect. Not more than 5 percent of the allotment may be used for monitoring and administration of the eligible system. The system may not use more than 5 percent of the allotment for

technical assistance and training to to implement this section. The eligible system may enter into contracts with State agencies and nonprofit organizations which operate throughout the State. Such agencies and organizations are to be independent of any agency that provides treatment or services (except advocacy services) to mentally ill persons. The organization must have the capacity to protect and advocate the established rights of mentally ill persons, and the eligible system is to consider contracting with organizations which, on the date of enactment, do provide such protection and advocacy services.

Subsection (b):

*Authority of System:* The system to protect and advocate the rights of mentally ill persons is to have the authority to investigate reported abuse and neglect, to pursue administrative, legal, and other remedies, and have access to residential facilities for mentally ill persons. The system is to exhaust all administrative remedies, where appropriate, prior to pursuing alternative remedies, including the initiation of legal action. However, this requirement does not apply to legal action to prevent or eliminate imminent serious harm to a mentally ill person.

*Access to Records:* The system is to have access to the records of a client of the system if such client or his guardian has authorized the access. The system is also to have access to the records of a person if a complaint has been received by the system, even if the client, by reason of a mental or physical condition, is unable to authorize the access to his record, if such person has no legal guardian or if the State is the legal guardian. The system may not disclose the information on the record to the client who is the subject of the record if it is determined that such disclosure would be detrimental to the client's health. The client, however, may select a mental health professional to review the record and determine whether such record should be disclosed. The protection and advocacy systems are to maintain client records in the same confidential manner required of the provider of mental health services from whom the record was obtained.

*Annual Survey Reports:* The protection and advocacy system for mentally ill persons in each State is to be provided a copy of each annual survey report and plan of corrections for deficiencies in the Medicare (title XVIII) and the Medicaid (title XIX) programs affecting residential facilities for mentally ill persons in that State.

*Advisory Board:* The system is to establish a board to provide advice on policies and priorities regarding protection of established rights of mentally ill persons. The board is to include attorneys, mental health professionals, knowledgeable public members, providers of mental health services, and recipients of such services and their family members.

*Annual Report:* Beginning January 1, 1987, the protection and advocacy system for mentally ill persons is to submit an annual report to the Secretary and the head of the State mental health agency describing the system's activities, accomplishments and expenditures.

*Attorney's Fees:* If the prevailing party in any legal action is represented by an eligible system, the attorney's fees which may be awarded to such system are to be computed at an hourly rate

which does not exceed the prevailing market hourly rate in the local area. In addition, such fees are to be based on the actual costs incurred by the eligible system including the percentage of the annual salary of each attorney involved and the percentage of the actual overhead expenses attributable to the provision of such legal representation.

Subsection (c) states that the Secretary is to allot the funds available on the basis of a formula based equally on: 1) the population of each State in which a protection and advocacy system has been established, and 2) the population of each such State weighted by its relative per capita income. The minimum allotment for the participating States, the District of Columbia and the Commonwealth of Puerto Rico is not to be less than $125,000. The allotments to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands or the Virgin Islands may not be less than $67,000. Funds awarded to eligible systems and not required by such systems are to be reallotted to other eligible systems able to make use of these funds.

Subsection (d) provides that an allotment may not be made to an eligible system unless an application is made to the Secretary that contains assurances that the Federal funds received will be used to supplement and not supplant non-Federal funds used in the State for protection and advocacy of mentally ill persons.

Subsection (e) provides that funds awarded to an eligible system in a fiscal year that are unobligated at the end of that year are to remain available to the system in the next fiscal year.

Subsection (f) requires the Secretary to submit annual reports to the Congress and President that describe the activities, accomplishments and expenditures of the systems established to advocate and protect the rights of mentally ill persons. The reports are to specify the number of persons served, the types of activities undertaken by the system, and the accomplishments resulting from these activities. The reports are also to describe the relationship between the systems' activities, other protection and advocacy activities conducted by the States, and the mechanisms established by residential facilities for protecting the rights of mentally ill persons. Recommendations for activities and services to improve protection and advocacy of the established rights of mentally ill persons are also to be included in the annual reports.

Subsection (g) authorizes the Secretary to provide technical assistance to eligible systems for the implementation of the protection and advocacy services for mentally ill persons.

Subsection (h) requires the Secretary to administer the protection and advocacy systems for mentally ill persons through the Administrator of the Alcohol, Drug Abuse, and Mental Health Administration.

Subsection (i) authorizes $10 million for FY 1986, $10.5 million for FY 1987, and $11.025 million for FY 1988.

### SECTION 6—TECHNICAL AMENDMENT

This section repeals title V of the Mental Health Systems Act.

### SECTION 7—EFFECTIVE DATE

This section states that the Act and the repeal are to be effective on October 1, 1985.

## DISCUSSION OF THE COMMITTEE BILL

### FINDINGS AND PURPOSES

The Committee bill reflects the need for an effective system to provide protection and advocacy for mentally ill persons. The findings state that (1) mentally ill persons in residential facilities are vulnerable to abuse and serious injury; (2) mentally ill persons in residential facilities are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care and adequate discharge planning; and (3) State systems for monitoring compliance by residential facilities with respect to the rights of mentally ill persons vary widely and are frequently inadequate.

The purpose of S. 974 is to facilitate the establishment of a system in each State to provide protection and advocacy to mentally ill persons. The bill authorizes systems to investigate reported incidents of abuse and neglect of mentally ill persons and to assist in the protection of their established rights under Federal, State and local statutes and the United States Constitution.

### DEFINITIONS (SECTION 3)

Section 3 of the Committee bill includes definitions for the terms "abuse", "neglect", "eligible system", "mentally ill person", "Secretary" and "State". In addition, the bill includes a clause prohibiting the promulgation of regulations which define the terms "mentally ill person" or "residential facility" for purposes of this Act.

*"Abuse" and "Neglect" (Section 3(a)(1) and Section 3(a)(4))*

The definitions of abuse and neglect contained within the bill were developed from existing written definitions and policies on abuse and neglect. Each definition contains examples of situations which are considered to be abuse or neglect. The Committee does not intend these examples to be exhaustive, but to suggest situations of physical or mental abuse and neglect found to occur. The Committee intends that the eligible system be guided as well by state law and policies on abuse and neglect where they exist.

The Committee notes that existing internal systems charged with protecting mentally ill persons are sometimes unable to investigate situations involving client-to-client abuse. The Committee intends that such client-to-client situations be considered neglect by the facility, because of the responsibility of the facility to provide a safe environment for the residents.

*"Eligible System" (Section (3)(a)(2))*

The Committee chose to utilize the existing Protection and Advocacy Agencies established under the Developmental Disabilities Assistance and Bill of Rights Act as the eligible system. This will require them to extend their existing services in order to protect and advocate for mentally ill persons.

In designating the existing Protection and Advocacy agency (hereinafter DD P&A System) as the eligible system, the Committee recognizes the importance of an advocacy system to be independent of any agency providing service to protect the mentally ill population. A recent report by the National Association of Protection and Advocacy Systems, Inc., indicates that the DD P&A System has been increasingly involved in advocacy for the mentally ill who are also developmentally disabled. This report, entitled "The Developmentally Disableld Protection and Advocacy System Report on Activities in FY 1984: Report on Mental Health Advocacy" (by Curtis Decker and Garry Shapiro) indicates that 9 percent of the clients served in nineteen states were mentally ill. The report also indicates that DD P&A Systems across the nation report a steadily increasing request for service from mentally ill persons.

While developmentally disabled, mentally retarded and mentally ill individuals often have very different client service needs, the types of abuse and neglect to which these groups are subjected in treatment facilities may be very similar, particularly in such areas as overuse or misuse of restraints and seclusion, inappropriate use of medication, and the lack of implementation of treatment plans. Thus, the committee's choice is to build on the experience of the existing DD P&A System in investigating and resolving situations involving abuse and neglect.

The committee believes that in most states the expenses associated with the operation of eligible systems can be minimized by centralizing advocacy efforts for these groups within the existing DD P&A Systems, thus allowing more funds to be used directly for service to mentally ill persons.

The Committee intends that the eligible system work in cooperation with existing advocacy agencies and organizations in providing protection and advocacy to mentally ill persons. For this reason, the Committee allows the DD P&A Systems to use its funding to subcontract services with existing mental health advocacy organizations as described in Section 5(a)(5).

The Committee does not intend to alter the traditional distinction within the Committee by which mental health issues are routinely handled as part of the Committee's health jurisdiction.

*"Mentally Ill Person" (Section 3(a)(3))*

The Committee intends that the focus of this legislation is the protection and advocacy of mentally ill patients or residents of 24-hour residential facilities who are abused or neglected. The Committee explicitly chose to prohibit the Secretary of Health and Human Services from issuing regulations to broaden or narrow the statutory language defining who is eligible for services under this legislation. Accordingly, it is the Committee's intention that protection and advocacy services should be available to all individuals who have a primary diagnosis of mental illness made by a state qualified mental health professional and who reside in a facility which provides 24-hour care and/or treatment.

A qualified mental health professional is intended by the Committee to include mental health specialists who are licensed or cer-

tified by the state, or where no state licensure exists, possess national licensure or certification.

The Committee intends that the term residential facility includes those providing 24-hour care and/or treatment where the mentally ill person, as part of a treatment plan, leave the facility for activities, training, employment, or other events.

*"Restriction on Promulgation of Regulations" (Section 3(b))*

Section 3(b) of the bill contains a clause prohibiting the Secretary from promulgating regulations which define the terms "mentally ill person" and "residential facility".

The Committee intends that the scope of this bill should not be broadened or narrowed through the regulatory process. The focus of the Committee bill is the protection and advocacy of mentally ill persons as defined within Section 3(a)(3) of the bill.

## BILL OF RIGHTS (SECTION 4)

Section 4 of the Committee bill, entitled "Bill of Rights", currently exists as Title V of the Mental Health Systems Act. The Committee bill, by repealing Title V of the Mental Health Systems Act and redesignating it as Section 4 of the bill, intends to continue without interruption this statement of Congressional viewpoint. Accordingly, the Committee reaffirms its commitment to the importance of the rights specified in this section and further encourages each state to review and revise its laws to ensure that mentally ill persons receive the protection and service they require.

## PROTECTION AND ADVOCACY SYSTEM (SECTION 5)

*Authority of the System*

The Committee bill provides for the establishment of a system in each state to protect and advocate the established rights of mentally ill persons and investigate reported incidents of abuse and neglect of such persons. The legislation does not grant any new rights to mentally ill persons, but does have as its intent the establishment of a system of advocacy to help protect currently established rights articulated in Federal and State laws or under the Constitution of the United States.

The Committee intends that "authority to pursue administrative, legal and other appropriate remedies" as contained in Section 5(b)(1)(A)(ii) includes monitoring, evaluating and commenting upon the development and implementation of Federal, State, and local laws, regulations, state plans, budgets, policies, programs, hearings, levies and community action which will affect mentally ill persons. However, the Committee intends that none of the funds from this Act shall be used to pay for any publicity or propaganda intended or designed to support or defeat any candidate for public office.

*Subcontracting of Services (Section 5(a)(5))*

As previously described, the Committee bill establishes the eligible system to be the existing DD P&A System as created under the Developmental Disabilities Assistance and Bill of Rights Act. However, the Committee recognizes that there are existing organiza-

tions within several states which provide advocacy services to mentally ill persons. For this reason, the Committee bill contains a clause which strongly encourages the eligible system to enter into contracts with existing agencies and nonprofit organizations which have experience in providing protection and advocacy to mentally ill persons. Such agencies and organizations should be independent or providers of mentally ill treatment services, other than advocacy services, to mentally ill persons.

*Access to Facilities and Records of Clients (Section 5(b)(1)(c) and Section 5(b)(1)(D))*

The Committee recognizes the need for full access to facilities and clients and to their records in order to ensure the protection of mentally ill persons. It is the intent of the Committee that the eligible system and programs under subcontract with them have the fullest possible access to client records with appropriate authorization and access to facilities where a complaint has been received on behalf of a mentally ill person.

However, it is the Committee's intention that the confidentiality of client records be maintained. Therefore, certain limitations have been placed on the access-to-records provisions included in the Committee bill. These limitations allow access to records by the eligible system when any person—

(I) who by reason of the mental or physical condition of such person is unable to authorize the system to have such access;

(II) who does not have a legal guardian or for whom legal guardian is the State; and

(III) is the subject of a complaint which has been received by the system.

The Committee bill further limits the eligible system from disclosure of information contained in the client's records to such client if the supervising mental health professional has made a written determination that such a disclosure would be detrimental to the client's health. However, if such a denial is made, the client or the guardian may select a qualified mental health professional who is authorized to review and evaluate information contained in the client's records in order to assess whether disclosure of the information would in fact be detrimental. In addition, the Committee intends that these records shall remain confidential and that the eligible system shall maintain confidentiality in compliance with applicable State, Federal, and local laws and the rules of any involved organization or institution which has legal responsibility for the records.

*Advisory Board (Section 5(b)(3))*

It is the intent of the Committee that each eligible system establish a board to advise on policies and priorities in protecting the rights of the mentally ill. The Committee bill, therefore, requires that each board shall include attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, a provider of mental health services, and family members of such persons. It is the Committee's intention that the board membership shall be chosen at the discretion of the eligible system and the board is not necessarily limited to this membership.

However, the Committee believes that, at a minimum, these individuals be familar with the needs of the mentally ill. Further, the Committee encourages the eligible system to include, as an ex-officio member, the State Mental Health Director.

*Exhaustion of Administrative Remedies (Section 5(b)(4))*

Prior to instituting any legal action in a Federal or State court on behalf of a mentally ill person, it is the Committee's intention that the eligible systems or programs under subcontract with them should exhaust all administrative remedies where appropriate. It is the further intention of the Committee that the exhaustion of administrative remedies be accomplished in a timely manner.

It is the belief of the Committee that conciliation, negotiation, mediation and other administrative procedures can work effectively in providing protection and advocacy of the mentally ill, especially because litigation in most instances is costly and time consuming. The Committee recognizes the experience of the DD P&A System in implementing such negotiation and mediation on behalf of persons with disabilities, as well as the system's use of other administrative remedies in lieu of litigation. The Committee further notes that only 5 percent of DD P&A cases in 1984 have resulted in court action. The Committee intends that the DD P&A System in its new role as the eligible protection and advocacy system for mentally ill persons under this Act should continue this non-litigative approach to advocacy and dispute resolution and urges the continued use of administrative and alternative remedies prior to the initiation of a legal action.

It is not the intention of the Committee that administrative remedies must be pursued for an unreasonable duration, but rather that whenever possible there should be timely and reasonable attempts made to mediate and negotiate approporiate adminstrative remedies. If the pursuit of administrative remedies has not resolved any matter within a reasonable time, the eligible system may pursue alternative remedies, including the initiation of a legal action. The Committee recommends that a 3-day notification be given to appropriate parties prior to filing any such action. However, legal remedies may be instituted immediately in order to eliminate or prevent imminent serious harm to a mentally ill client.

Finally, the Committee does not intend that the administrative remedies which clients may pursue should affect their rights otherwise existing under Federal and State law to full judicial consideration of their claims on all matters of fact and law.

*Attorney's Fees (Section 5(b)(4))*

The Committee believes that if attorney's fees are awarded, the court should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salaries and of the organization's annual overhead attributable to the number of hours reasonably spent on the case. This provision is modeled after recommendations made by the National Association of Attorneys General in their "Report to Congress on Civil Rights Attorney's Fees Awards Act of 1976." Further, the Committee intends that the

courts should compute a "reasonable" hourly rate which is below the prevailing market rate.

*Administrative Costs (Section (a)(3))*

The Committee intends that, to the greatest extent possible, federal funds for the eligible systems should be utilized to provide protection and advocacy services to mentally ill persons. Therefore, the Committee bill provides that not more than 5 percent of any state allotment may be used for state administrative and monitoring costs.

*Technical Assistance and Training*

The Committee recognizes the need for technical assistance training for new staff employed by the eligible system.

Accordingly, Section 5(a)(4) of the Committee bill enables the individual eligible system to expend up to 5 percent of its allotment on technical assistance and training in order to carry out responsibilities under this Act.

In addition, Section 5(g) of the Committee bill allows the Secretary to provide technical assistance to eligible systems with respect to activities carried out under the Act. Such technical assistance may include but need not be limited to training for mental health and information on advocacy techniques designed to resolve disputes early in the protection and advocacy process and, thus, avoid costly and time-consuming litigation.

*Authorization and Minimum Allotments (Section 5(c))*

The Committee recommends that the authorization level for this program be $10,000,000 for fiscal year 1986, $10,500,000 for fiscal year 1987, and $11,025,000 for fiscal year 1988, with state minimum allotments of $125,000 and territory minimum allotments of $67,000. The following table shows estimated allotments for each eligible system under the Committee bill.

TABLE 1.—ESTIMATED PROTECTION AND ADVOCACY FORMULA ALLOTMENTS,[1] AS REPORTED IN S. 974, JULY 10, 1985

[all estimates are in thousands]

| State | Estimated allotments— | | |
|---|---|---|---|
| | $10 million authorization | $10.5 million authorization | $11.025 million authorization |
| Alabama | $144 | $156 | $168 |
| Alaska | 125 | 125 | 125 |
| Arizona | 125 | 125 | 125 |
| Arkansas | 125 | 125 | 125 |
| California | 748 | 808 | 871 |
| Colorado | 125 | 125 | 125 |
| Connecticut | 125 | 125 | 125 |
| Delaware | 125 | 125 | 125 |
| District of Columbia | 125 | 125 | 125 |
| Florida | 336 | 363 | 391 |
| Georgia | 195 | 211 | 227 |
| Hawaii | 125 | 125 | 125 |
| Idaho | 125 | 125 | 125 |
| Illinois | 353 | 381 | 410 |
| Indiana | 185 | 200 | 215 |

TABLE 1.—ESTIMATED PROTECTION AND ADVOCACY FORMULA ALLOTMENTS,[1] AS REPORTED IN S. 974, JULY 10, 1985—Continued

[all estimates are in thousands]

| State | Estimated allotments— | | |
|---|---|---|---|
| | $10 million authorization | $10.5 million authorization | $11.025 million authorization |
| Iowa | 125 | 125 | 125 |
| Kansas | 125 | 125 | 125 |
| Kentucky | 132 | 142 | 153 |
| Louisiana | 146 | 158 | 170 |
| Maine | 125 | 125 | 125 |
| Maryland | 131 | 141 | 152 |
| Massachusetts | 178 | 192 | 207 |
| Michigan | 294 | 318 | 343 |
| Minnesota | 132 | 143 | 154 |
| Mississippi | 125 | 125 | 125 |
| Missouri | 166 | 179 | 193 |
| Montana | 125 | 125 | 125 |
| Nebraska | 125 | 125 | 125 |
| Nevada | 125 | 125 | 125 |
| New Hampshire | 125 | 125 | 125 |
| New Jersey | 221 | 239 | 257 |
| New Mexico | 125 | 125 | 125 |
| New York | 539 | 583 | 628 |
| North Carolina | 215 | 232 | 250 |
| North Dakota | 125 | 125 | 125 |
| Ohio | 353 | 382 | 411 |
| Oklahoma | 125 | 125 | 125 |
| Oregon | 125 | 125 | 125 |
| Pennsylvania | 383 | 414 | 446 |
| Puerto Rico | 198 | 214 | 231 |
| Rhode Island | 125 | 125 | 125 |
| South Carolina | 125 | 128 | 138 |
| South Dakota | 125 | 125 | 125 |
| Tennessee | 167 | 181 | 195 |
| Texas | 484 | 523 | 563 |
| Utah | 125 | 125 | 125 |
| Vermont | 125 | 125 | 125 |
| Virginia | 176 | 190 | 205 |
| Washington | 134 | 144 | 156 |
| West Virginia | 125 | 125 | 125 |
| Wisconsin | 155 | 168 | 181 |
| Wyoming | 125 | 125 | 125 |
| American Samoa | 67 | 67 | 67 |
| Guam | 67 | 67 | 67 |
| Northern Marianas | 67 | 67 | 67 |
| Trust Territories | 67 | 67 | 67 |
| Virgin Islands | 67 | 67 | 67 |
| U.S. total | 10,000 | 10,500 | 11,025 |

[1] Allotments assume all States and Puerto Rico would receive a minimum of $125,000. Outlying territories would have a minimum of $67,000.

Note.—Table prepared by CRS. Estimates are subject to limitations of the data and the assumptins used to make the estimates. All figures are estimated and will change with the use of different data or assumptions.

Source: All estimates are based upon a State's relative per capita income and population. Per capita income data was obtained from the Survey of Current Business, August 1983. Population figures are Census bureau estimates for July 1, 1982.

### *Annual Survey Reports and Plans of Correction (Section 5(b)(1)(E))*

Section 6(b)(1)(E) of the Committee bill requires that each eligible system be provided with the annual survey report and plan of corrections for cited deficiencies with respect to any treatment facility

for mentally ill persons, as required by Titles XVIII and XIX of the Social Security Act.

The Committee believes that this information is necessary in order to assist the eligible system adequately to protect the established rights of mentally ill persons.

*Annual Report (Section 5(b)(1)(F))*

The Committee bill requires each eligible system to prepare an annual report which must be transmitted to the Secretary of Health and Human Services and to the head of the State Mental Health Agency in their state. The Committee intends that the annual report describe the activities, accomplishments and expenditures of the system established pursuant to this Act to protect and advocate for mentally ill persons.

*Report to Congress (Section 5(f)(1))*

The Committee bill requires the Secretary of Health and Human Services to submit an annual report to Congress describing the activities, accomplishments and expenditures of systems to protect and advocate for mentally ill persons established pursuant to this Act. This report should be a part of the report required under Section 107(c) of the Developmental Disabilities Assistance and Bill of Rights Act.

The Committee expects the Alcohol, Drug Abuse and Mental Health Administration to expedite any necessary regulations pertaining to this section so that Congress will be assured of receiving information on systems to protect and advocate for mentally ill persons in the Annual Report due April 1, 1987.

## IV. Budget Estimate

### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 974.

2. Bill title: Protection and Advocacy for Mentally Ill Persons Act of 1985.

3. Bill status: As ordered reported by the Senate Committee on Labor and Human Resources on July 10, 1985.

4. Bill purpose: This bill would assist states in establishing protection and advocacy systems for mentally ill persons.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

| | 1986 | 1987 | 1988 | 1989 | 1990 |
|---|---|---|---|---|---|
| Protection and advocacy systems: | | | | | |
| Authorization level | 10.1 | 10.5 | 11.0 | ..... | ..... |
| Estimated outlays | 2.1 | 7.3 | 9.6 | 8.3 | 3.0 |

The costs of this bill falls within function 550.

The authorization level is stated in the bill. CBO assumes that all stated authorized amounts are fully appropriated at the begin-

ning of each fiscal year. Outlays are estimated using spendout rates computed by CBO on the basis of recent program data.

This bill would authorize federal funds for three years to assist states in establishing protection and advocacy systems for mentally ill persons. The bill would also allow the Secretary of Health and Human Services to provide technical assistance to states, but no specific authorization level for such assistance appears in the bill. CBO has not included an estimate for this as Committee staff has stated that it is the Committee's intent that funds otherwise appropriated to the Alcohol, Drug Abuse, and Mental Health Administration for technical assistance to states be redirected to include the technical assistance provided in this bill.

6. Estimated cost to State and local governments: The budgets of state and local governments would not be affected directly by the enactment of this bill. The bill specifically states that allotments to states for establishing protection and advocacy systems would be used to supplement and not supplant the level of non-federal funds that would otherwise be made available for this activity.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carmela Pena.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistan Director, for Budget Analysis).

## V. Tabulation of Votes Cast in Committee

The motion to favorably report the bill to the Senate was passed unanimously by the Committee on July 10, 1985.

## VI. Regulatory Impact Statement

The Committee has determined that there will be minimal increases in the regulatory burden imposed by the bill.

## VII. Change in Existing Law

In compliance with rule XXVI paragraph 12 of the Standard Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### Mental Health Systems Act

* * * * * * *

### TITLE V—MENTAL HEALTH RIGHTS AND ADVOCACY

#### BILL OF RIGHTS

[Sec. 501. It is the sense of the Congress that each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision should take into account the recommendations of the President's Commission on Mental Health and the following:

[(1) A person admitted to a program or facility for the purpose of receiving mental health services should be accorded the following:

[(A) The right to appropriate treatment and related services in a setting and under conditions that—

[(i) are the most supportive of such person's personal liberty; and

[(ii) restrict such liberty only to the extent necessary consistent with such person's treatment needs, applicable requirements of law, and applicable judicial orders.

[(B) The right to an individualized, written, treatment or service plan (such plan to be developed promptly after admission of such person), the right to treatment based on such plan, the right to periodic review and reassessment of treatment and related service needs, and the right to appropriate revision of such plan, including any revision necessary to provide a description of mental health services that may be needed after such person is discharged from such program or facility.

[(C) The right to ongoing participation, in a manner appropriate to such person's capabilities, in the planning of mental health services to be provided such person (including the right to participate in the development and periodic revision of the plan described in subparagraph (B)), and, in connection with such participation, the right to be provided with a reasonable explanation, in terms and language appropriate to such person's condition and ability to understand, of—

[(i) such person's general mental condition and, if such program or facility has provided a physical examination, such person's general physical condition;

[(ii) the objectives of treatment;

[(iii) the nature and significant possible adverse effects of recommended treatments;

[(iv) the reasons why a particular treatment is considered appropriate;

[(v) the reasons why access to certain visitors may not be appropriate; and

[(vi) any appropriate and available alternative treatments, services, and types of providers of mental health services.

[(D) The right not to receive a mode or course of treatment, established pursuant to the treatment plan, in the absence of such person's informed, voluntary, written consent to such mode or course of treatment, except treatment—

[(i) during an emergency situation if such treatment is pursuant to or documented contemporaneously by the written order of a responsible mental health professional; or

[(ii) as permitted under applicable law in the case of a person committed by a court to a treatment program or facility.

[(E) The right not to participate in experimentation in the absence of such person's informed, voluntary, written consent, the right to appropriate protections in connection with such participation, including the right to a reasonable explanation of the procedure to be followed, the benefits to be expected, the relative advantages of alternative treatments, and the potential discomforts and risks, and the right and opportunity to revoke such consent.

[(F) The right to freedom from restraint or seclusion, other than as a mode or course of treatment or restraint or seclusion during an emergency situation if such restraint or seclusion is pursuant to or documented contemporaneously by the written order of a responsible mental health professional.

[(G) The right to a humane treatment environment that affords reasonable protection from harm and appropriate privacy to such person with regard to personal needs.

[(H) The right to confidentiality of such person's records.

[(I) The right to access, upon request, to such person's mental health care records, except such person may be refused access to—

[(i) information in such records provided by a third party under assurance that such information shall remain confidential; and

[(ii) specific material in such records if the health professional responsible for the mental health services concerned has made a determination in writing that such access would be detrimental to such person's health, except that such material may be made available to a similarly licensed health professional selected by such person and such health professional may, in the exercise of professional judgment, provide such person with access to any or all parts of such material or otherwise disclose the information contained in such material to such person.

[(J) The right, in the case of a person admitted on a residential or inpatient care basis, to converse with others privately, to have convenient and reasonable access to the telephone and mails, and to see visitors during regularly scheduled hours, except that, if a mental health professional treating such person determines that denial of access to a particular visitor is necessary for treatment purposes, such mental health professional may, for a specific, limited, and reasonable period of time, deny such access if such mental health professional has ordered such denial in writing and such order has been incorporated in the treatment plan for such person. An order denying such access should include the reasons for such denial.

[(K) The right to be informed promptly at the time of admission and periodically thereafter, in language and terms appropriate to such person's condition and ability to understand, of the rights described in this section.

[(L) The right to assert grievances with respect to infringement of the rights described in this section, including the right to have such grievances considered in a fair, timely, and impartial grievance procedure provided for or by the program or facility.

[(M) Notwithstanding subparagraph (J), the right of access to (including the opportunities and facilities for private communication with) any available—

[(i) rights protection service within the program or facility;

[(ii) rights protection service within the State mental health system designed to be available to such person; and

[(iii) qualified advocate;

for the purpose of receiving assistance to understand, exercise, and protect the rights described in this section and in other provisions of law.

[(N) The right to exercise the rights described in this section without reprisal, including reprisal in the form of denial of any appropriate, available treatment.

[(O) The right to referral as appropriate to other providers of mental health services upon discharge.

[(2)(A) The rights described in this section should be in addition to and not in derogation of any other statutory or constitutional rights.

[(B) The rights to confidentiality of and access to records as provided in subparagraphs (H) and (I) of paragraph (1) should remain applicable to records pertaining to a person after such person's discharge from a program or facility.

[(3)(A) No otherwise eligible person should be denied admission to a program or facility for mental health services as a reprisal for the exercise of the rights described in this section.

[(B) Nothing in this section should—

[(i) obligate an individual mental health or health professional to administer treatment contrary to such professional's clinical judgment;

[(ii) prevent any program or facility from discharging any person for whom the provision of appropriate treatment, consistent with the clinical judgment of the mental health professional primarily responsible for such person's treatment, is or has become impossible as a result of such person's refusal to consent to such treatment;

[(iii) require a program or facility to admit any person who, while admitted on prior occasions to such program or facility, has repeatedly frustrated the purposes of such admissions by withholding consent to proposed treatment; or

[(iv) obligate a program or facility to provide treatment services to any person who is admitted to such program or facility solely for diagnostic or evaluative purposes.

[(C) In order to assist a person admitted to a program or facility in the exercise or protection of such person's rights, such person's attorney or legal representatives should have reasonable access to—

[(i) such person;

[(ii) the areas of the program or facility where such person has received treatment, resided, or had access; and

[(iii) pursuant to the written authorization of such person, the records and information pertaining to such person's diagnosis, treatment, and related services described in paragraph (1)(I).

[(D) Each program and facility should post a notice listing and describing, in language and terms appropriate to the ability of the presons to whom such notice is addressed to understand, the rights described in this section of all persons admitted to such program or facility. Each such notice should conform to the format and content for such notices, and should be posted in all appropriate locations.

[(4)(A) In the case of a person adjudicated by a court of competent jurisdiction as being incompetent to exercise the right to consent to treatment or experimentation described in subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), such right may be exercised or such authorization may be provided by the individual appointed by such court as such person's guardian or representative for the purpose of exercising such right or such authorization.

[(B) In the case of a person who lacks capacity to exercise the right to consent to treatment or experimentation under subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), because such person has not attained an age considered sufficiently advanced under State law to permit the exercise of such right or such authorization to be legally binding, such right may be exercised or such authorization may be provided on behalf of such person by a parent or legal guardian of such person.

[(C) Notwithstanding subparagraphs (A) and (B), in the case of a person admitted to a program or facility for the purpose of receiving mental health services, no individual employed by or receiving any remuneration from program or facility should act as such person's guardian or representative.]

* * * * * * *

*That this Act may be cited as the "Protection and Advocacy for Mentally Ill Persons Act of 1985".*

*FINDINGS AND PURPOSES*

*SEC. 2. (a) The Congress finds that—*

*(1) mentally ill persons are vulnerable to abuse and serious injury;*

*(2) mentally ill persons are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and*

*(3) State systems for monitoring compliance with respect to the established rights of mentally ill persons vary widely and are frequently inadequate.*

*(b) The purposes of this Act are—*

*(1) to ensure that the established rights of mentally ill persons are protected; and*

*(2) to assist States to establish and operate a protection and advocacy system for mentally ill persons which will—*

*(A) protect and advocate the established rights of such persons through activities to ensure the enforcement of the Constitution and Federal and State statutes; and*

*(B) investigate reported incidents of abuse and neglect of mentally ill persons.*

*DEFINITIONS*

*SEC. 3. (a) For purposes of this Act:*

*(1) The term "abuse" means any act or failure to act by an employee of a residential facility which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, physical injury to a mentally ill person, and includes acts such as—*

*(A) the rape or sexual assault of a mentally ill person;*

*(B) the striking of a mentally ill person;*

*(C) the use of excessive force when placing a mentally ill person in bodily restraints; and*

*(D) the use of bodily or chemical restraints on a mentally ill person which is not in compliance with Federal and State laws and regulations.*

*(2) The term "eligible system" means the system established in a State to protect and advocate the rights of persons with developmental disabilities under part C of the Developmental Disabilities Assistance and Bill of Rights Act.*

*(3) The term "mentally ill person" means an individual—*

*(A) for whom a primary diagnosis of mental illness has been made by a mental health professional qualified under the laws of the State; and*

*(B) who is an inpatient or resident in, and who resides for 24 hours a day in a residential facility.*

*(4) The term "neglect" means a negligent act or omission by any person responsible for providing services in a residential facility which caused or may have caused physical or mental injury to a mentally ill person or which placed a mentally ill person at risk of physical or mental injury, and includes an act or omission such as the failure to establish or carry out an appropriate individual program plan or treatment plan for a mentally ill person, the failure to provide adequate nutrition, clothing, or health care to a mentally ill person, or the failure to provide a safe environment for a mentally ill person.*

*(5) The term "Secretary" means the Secretary of Health and Human Services.*

*(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.*

*(b) The Secretary may not promulgate regulations which define the terms "mentally ill person" and "residential facility" for purposes of this Act.*

*BILL OF RIGHTS*

*SEC. 4. It is the sense of the Congress that, as previously stated in title V of the Mental Health Systems Act, each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require, and that in making such review and revision, States should take into account the recommendations of the President's Commission on Mental Health and the following:*

*(1) A person admitted to a program or facility for the purpose of receiving mental health services should be accorded the following:*

*(A) The right to appropriate treatment and related services in a setting and under conditions that—*

*(i) are the most supportive of such person's personal liberty; and*

*(ii) restrict such liberty only to the extent necessary consistent with such person's treatment needs, applicable requirements of law, and applicable judicial orders.*

*(B) The right to an individualized, written, treatment or service plan (such plan to be developed promptly after admission of such person), the right to treatment based on such plan, the right to periodic review and reassessment of treatment and related service needs, and the right to appropriate revision of such plan, including any revision necessary to provide a description of mental health services that may be needed after such person is discharged from such program or facility.*

*(C) The right to ongoing participation, in a manner appropriate to such person's capabilities, in the planning of mental health services to be provided such person (including the right to participate in the development and periodic revision of the plan described in subparagraph (B)), and, in connection with such participation, the right to be provided with a reasonable explanation, in terms and language appropriate to such person's condition and ability to understand, of—*

*(i) such person's general mental condition and, if such program or facility has provided a physical examination, such person's general physical condition;*

*(ii) the objectives of treatment;*

*(iii) the nature and significant possible adverse effects of recommended treatments;*

*(iv) the reasons why a particular treatment is considered appropriate;*

*(v) the reasons why access to certain visitors may not be appropriate; and*

*(vi) any appropriate and available alternative treatments, services, and types of providers of mental health services.*

*(D) The right not to receive a mode or course of treatment, established pursuant to the treatment plan, in the absence of such person's informed, voluntary, written consent to such mode or course of treatment, except treatment—*

*(i) during an emergency situation if such treatment is pursuant to or documented contemporaneously by the written order of a responsible mental health professional; or*

*(ii) as permitted under applicable law in the case of a person committed by a court to a treatment program or facility.*

*(E) The right not to participate in experimentation in the absence of such person's informed, voluntary, written consent, the right to appropriate protections in connection with such participation, including the right to a reasonable explanation of the procedure to be followed, the benefits to be expected, the relative advantages of alternative treatments, and the potential discomforts and risks, and the right and opportunity to revoke such consent.*

*(F) The right to freedom from restraint or seclusion, other than as a mode or course of treatment or restraint or seclusion during an emergency situation if such restraint or seclusion is pursuant to or documented contemporaneously by the written order of a responsible mental health professional.*

*(G) The right to a humane treatment environment that affords reasonable protection from harm and appropriate privacy to such person with regard to personal needs.*

*(H) The right to confidentiality of such person's records.*

*(I) The right to access, upon request, to such person's mental health care records, except such person may be refused access to—*

*(i) information in such records provided by a third party under assurance that such information shall remain confidential; and*

*(ii) specific material in such records if the health professional responsible for the mental health services concerned has made a determination in writing that such access would be detrimental to such person's health, except that such material may be made available to a similarly licensed health professional selected by such person and such health professional may, in the exercise of professional judgment, provide such person with access to any or all parts of such material or otherwise disclose the information contained in such material to such person.*

*(J) The right, in the case of a person admitted on a residential or inpatient care basis, to converse with others privately, to have convenient and reasonable access to the telephone and mails, and to see visitors during regularly scheduled hours, except that, if a mental health professional treating such person determines that denial of access to a particular visitor is necessary for treatment purposes,*

*such mental health professional may, for a specific, limited, and reasonable period of time, deny such access if such mental health professional has ordered such denial in writing and such order has been incorporated in the treatment plan for such person. An order denying such access should include the reasons for such denial.*

*(K) The right to be informed promptly at the time of admission and periodically thereafter, in language and terms appropriate to such person's condition and ability to understand, of the rights described in this section.*

*(L) The right to assert grievances with respect to infringement of the rights described in this section, including the right to have such grievances considered in a fair, timely, and impartial grievance procedure provided for or by the program or facility.*

*(M) Notwithstanding subparagraph (J), the right of access to (including the opportunities and facilities for private communication with) any available—*

*(i) rights protection service within the program or facility;*

*(ii) rights protection service within the State mental health system designed to be available to such person;*

*(iii) system to protect and advocate the rights of mentally ill persons established under section 5; and*

*(iv) qualified advocate;*

*for the purpose of receiving assistance to understand, exercise, and protect the rights described in this section and in other provisions of law.*

*(N) The right to exercise the rights described in this section without reprisal, including reprisal in the form of denial of any appropriate, available treatment.*

*(O) The right to referral as appropriate to other providers of mental health services upon discharge.*

*(2)(A) The rights described in this section should be in addition to and not in derogation of any other statutory or constitutional rights.*

*(B) The rights to confidentiality of and access to records as provided in subparagraphs (H) and (I) of paragraph (1) should remain applicable to records pertaining to a person after such person's discharge from a program or facility.*

*(3)(A) No otherwise eligible person should be denied admission to a program or facility for mental health services as a reprisal for the exercise of the rights described in this section.*

*(B) Nothing in this section should—*

*(i) obligate an individual mental health or health professional to administer treatment contrary to such professional's clinical judgment;*

*(ii) prevent any program or facility from discharging any person for whom the provision of appropriate treatment, consistent with the clinical judgment of the mental health professional primarily responsible for such person's treatment, is or has become impossible as a result of such person's refusal to consent to such treatment;*

*(iii) require a program or facility to admit any person who, while admitted on prior occasions to such program or facility, has repeatedly frustrated the purposes of such admissions by withholding consent to proposed treatment; or*

*(iv) obligate a program or facility to provide treatment services to any person who is admitted to such program or facility solely for diagnostic or evaluative purposes.*

*(C) In order to assist a person admitted to a program or facility in the exercise or protection of such person's rights, such person's attorney or legal representatives should have reasonable access to—*

*(i) such person;*

*(ii) the areas of the program or facility where such person has received treatment, resided, or had access; and*

*(iii) pursuant to the written authorization of such person, the records and information pertaining to such person's diagnosis, treatment, and related services described in paragraph (1)(I).*

*(D) Each program and facility should post a notice listing and describing, in language and terms appropriate to the ability of the persons to whom such notice is addressed to understand, the rights described in this section of all persons admitted to such program or facility. Each such notice should conform to the format and content for such notices, and should be posted in all appropriate locations.*

*(4)(A) In the case of a person adjudicated by a court of competent jurisdiction as being incompetent to exercise the right to consent to treatment or experimentation described in subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), such right may be exercised or such authorization may be provided by the individual appointed by such court as such person's guardian or representative for the purpose of exercising such right or such authorization.*

*(B) In the case of a person who lacks capacity to exercise the right to consent to treatment or experimentation under subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph (H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), because such person has not attained an age considered sufficiently advanced under State law to permit the exercise of such right or such authorization to be legally binding, such right may be exercised or such authorization may be provided on behalf of such person by a parent or legal guardian of such person.*

*(C) Notwithstanding subparagraphs (A) and (B), in the case of a person admitted to a program or facility for the purpose of receiving mental health services, no individual employed by or receiving any remuneration from such program or facility should act as such person's guardian or representative.*

*PROTECTION AND ADVOCACY SYSTEM*

*SEC. 5. (a)(1) The eligible system of a State may apply for an allotment for each fiscal year under this section.*

*(2) Payments from such allotment shall be used by such eligible system to establish in the State a system which complies with subsection (b) to—*

*(A) protect and advocate the established rights of mentally ill persons; and*

*(B) investigate reported incidents of abuse and neglect of mentally ill persons.*

*(3) All agencies of a State (other than the eligible system) may not use more than a total of 5 percent of any allotment under this section for any fiscal year for the costs of monitoring the administration of the system established under this section.*

*(4) An eligible system may not use more than 5 percent of any allotment under this section for any fiscal year for the costs of providing technical assistance and training to carry out this section.*

*(5)(A) In carrying out this section, an eligible system may use its allotment under this section to enter into contracts with State agencies and nonprofit organizations which operate throughout the State. In order to be eligible for a contract under this paragraph—*

*(i) such an agency shall be independent of any agency which provides treatment or services (other than advocacy services) to mentally ill persons; and*

*(ii) such an agency or such an organization shall have the capacity to protect and advocate the established rights of mentally ill persons.*

*(B) In carrying out subparagraph (A), an eligible system should consider entering into contracts with organizations which, on the date of enactment of this Act, provide protection or advocacy services to mentally ill persons.*

*(b)(1) A system established in a State under subsection (a) to protect and advocate the established rights of mentally ill persons shall—*

*(A) have the authority to—*

*(i) investigate reported incidents of abuse and neglect of mentally ill persons; and*

*(ii) pursue administrative, legal, and other appropriate remedies to ensure the protection of mentally ill persons who are receiving treatment in the State;*

*(B) be independent of any agency which provides treatment or services (other than advocacy services) to mentally ill persons;*

*(C) have access to residential facilities for mentally ill persons in the State;*

*(D) in accordance with paragraph (2), have access to all records of—*

*(i) any person who is a client of the system if such person or the guardian of such person has authorized the system to have such access; and*

*(ii) any person—*

*(I) who by reason of the mental or physical condition of such person is unable to authorize the system to have such access;*

*(II) who does not have a legal guardian or for whom legal guardian is the State; and*

*(III) with respect to whom a complaint has been received by the system;*

*(E) be provided with a copy of each annual survey report and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act with respect to any residential facility for mentally ill persons within 30 days after the completion of each such report or plan;*

*(F) establish a board which complies with paragraph (3) to advise the system on policies and priorities to be carried out in protecting and advocating the established rights of mentally ill persons; and*

*(G) on January 1, 1987, and January 1 of each succeeding year, prepare and transmit to the Secretary and the head of the State mental health agency a report describing the activities, accomplishments, and expenditures of the system during the most recently completed fiscal year.*

*(2)(A)(i) A system established in a State under this section which has access to records pursuant to paragraph (1)(D) shall not disclose information to the person who is the subject of the record if the mental health professional responsible for supervising the provision of mental health services to such person has made a written determination that the disclosure of such information to such person would be detrimental to such person's health, except as provided in clause (ii).*

*(ii) A person to whom disclosure of information has been denied under clause (i), or the guardian of such a person, may select a mental health professional with qualifications similar to the mental health professional who made the determination with respect to such person under such clause. The mental health professional selected under this clause shall review such information and determine, based on the professional judgment of such mental health professional, whether to disclose all or part of such information to such person.*

*(B) A system established in a State under this section which, pursuant to paragraph (1)(D), has access to records which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services, shall maintain the confidentiality of such records to the same extent as is required of the provider of such services.*

*(3) Each board established under paragraph (1)(F) shall include attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, a provider of mental health services, persons who have received or are receiving mental health services, and family members of such persons.*

*(4)(A) Prior to instituting any legal action in a Federal or State court on behalf of a mentally ill person, a system established in a State under this section or a State agency or nonprofit organization which entered into a contract under subsection (a)(5) shall exhaust in a timely manner all administrative remedies where appropriate. If the pursuit of administrative remedies has not resolved any matter with respect to such person within a reasonable time, such*

*system, agency, or organization may pursue alternative remedies, including the initiation of a legal action.*

*(B) The provisions of subparagraph (A) shall not apply to any legal action instituted by a system established in a State under this section or a State agency or nonprofit organization which entered into a contract under subsection (a)(5) in order to prevent or eliminate imminent serious harm to a mentally ill person.*

*(5) If the prevailing party in any legal action is represented by a system established in a State under this section or a State agency or a nonprofit organization which has entered into a contract under subsection (a)(5), the attorney's fees which may be awarded to such system, agency, or organization shall be computed at an hourly rate which—*

*(A) does not exceed the prevailing market hourly rate for the services of attorneys in the area in which the legal action is adjudicated; and*

*(B) is based on the actual costs incurred by such system, agency, or organization in providing such representation, including the percentage of the annual salary of each attorney providing such representation attributable to the number of hours incurred by such attorney in providing such representation and the percentage of the annual overhead expenses of such system, agency, or organization attributable to the provision of such representation.*

*(c)(1)(A) Except as provided in paragraph (2), the Secretary shall allot the amounts available for allotment under this section for a fiscal year to eligible systems on the basis of a formula prescribed by the Secretary which is based equally—*

*(i) on the population of each State in which an eligible system has been established, and*

*(ii) on the population of each such State weighted by its relative per capita income.*

*(B) For purposes of subparagraph (A)(ii), the term "relative per capita income" means the quotient of the per capita income of the United States and the per capita income of the State, except that if the State is Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or the Virgin Islands, the quotient shall be considered to be one.*

*(2) Notwithstanding paragraph (1)—*

*(A) the allotment of the eligible system of each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico shall not be less than $125,000; and*

*(B) the allotment of the eligible system of each of Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or the Virgin Islands shall not be less than $67,000.*

*(3) The amount of an allotment to an eligible system for a fiscal year which the Secretary determines will not be required by the eligible system during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary from time to time, on such date or dates as the Secretary may fix (but not earlier than thirty days after the Secretary has published notice of the intention of the Secretary to make such reallot-*

*ment in the Federal Register), to other eligible systems with respect to which such a determination has not been made, in proportion to the original allotments of such eligible systems for such fiscal year, but with such proportionate amount for any of such other eligible systems being reduced to the extent it exceeds the sum the Secretary estimates such eligible system needs and will be able to use during such period; and the total of such reductions shall be similarly reallotted among the eligible systems whose proportionate amounts were not so reduced. Any amount so reallotted to an eligible system for a fiscal year shall be deemed to be a part of its allotment under paragraphs (1) and (2) for such fiscal year.*

*(d) No allotment may be made to an eligible system unless an application therefor is submitted to the Secretary. Each such application shall contain—*

*(1) assurances that amounts paid to such system from an allotment under this section will be used to supplement and not to supplant the level of non-Federal funds available in the State in which such eligible system is established to protect and advocate the established rights of mentally ill persons; and*

*(2) such other information as the Secretary may by regulation prescribe.*

*(e) For each fiscal year, the Secretary shall make payments to each eligible system from its allotment under subsection (c). Any amount paid to an eligible system for a fiscal year and remaining unobligated at the end of such year shall remain available to such system for the purposes for which it was made for the next fiscal year.*

*(f)(1) The Secretary shall include in each report required under section 107(c) of the Developmental Disabilities Assistance and Bill of Rights Act a separate statement describing—*

*(A) the activities, accomplishments, and expenditures of systems to protect and advocate the established rights of mentally ill persons supported with payments from allotments under this section, including—*

*(i) a specification of the total number of mentally ill persons served by such systems;*

*(ii) a description of the types of activities undertaken by such systems;*

*(iii) a description of the types of residential facilities for mentally ill persons with respect to which such activities are undertaken;*

*(iv) a description of the manner in which such activities are initiated; and*

*(v) a description of the accomplishments resulting from such activities;*

*(B) a description of the relationships between—*

*(i) systems to protect and advocate the established rights of mentally ill persons supported with payments from allotments under this section; and*

*(ii)(I) activities conducted by States to protect and advocate such rights; and*

*(II) mechanisms established by residential facilities for mentally ill persons to protect and advocate such rights; and*

*(C) recommendations for activities and services to improve the protection and advocacy of the established rights of mentally ill persons and a description of needs for such activities and services which have not been met by systems established under this Act.*

*(2) In preparing the statement required by paragraph (1), the Secretary shall use and include information submitted to the Secretary in the reports required under subsection (b)(1)(G).*

*(g) The Secretary may provide technical assistance to eligible systems with respect to activities carried out under this section.*

*(h) The Secretary shall carry out this section through the Administrator of the Alcohol, Drug Abuse, and Mental Health Administration.*

*(i) For allotments under this section, there are authorized to be appropriated $10,000,000 for fiscal year 1986, $10,500,000 for fiscal year 1987, and $11,025,000 for fiscal year 1988.*

*TECHNICAL AMENDMENT*

*SEC. 6. Title V of the Mental Health Systems Act is repealed.*

*EFFECTIVE DATE*

*SEC. 7. This Act and the repeal made by this Act shall take effect on October 1, 1985.*

## VIII. ADDITIONAL VIEWS BY MESSRS. KERRY, KENNEDY, SIMON, METZENBAUM, MATSUNAGA, DODD, AND PELL

We strongly support the steps that the Committee on Labor and Human Resources has taken in passing the very much needed Protection and Advocacy for the Mentally Ill! Persons Act, thus ensuring protective rights to all mentally ill persons residing in institutions throughout this country.

There is one provision however, which we believe must be deleted from the legislation. Language exists in the bill which will limit attorneys' fees available to non-profit, publicly funded organizations who provide legal assistance, yet will not limit fees to privately funded attorneys. Undoubtedly, this creates a blatant double standard which will have a particularly negative impact on lower income individuals most dependent on legal representation by publicly funded attorneys. Furthermore, requiring that attorneys' fees awarded to publicly funded attorneys be computed according to a cost-based standard rather than the prevailing market-based standard used by private attorneys, will set a dangerous precedent of dual standards for all future cases litigated in this area.

We would like to note last year's U.S. Supreme Court decision, *Blum* v. *Stenson*, where the court ruled unanimously that under the Civil Rights Attorneys Act of 1976, all attorneys' fees, (including publicly funded attorneys' fees), must be calculated according to prevailing market rates. Before Congressional intent is created through passage of this provision regarding lower attorneys' fees awards in cases brought to court for mentally ill individuals in institutions, Congress should have the opportunity to closely examine this important issue. It is our belief that after extensive study of the precedent setting issue, Congress will preserve the standards upheld in the *Blum* v. *Stenson* decision.

In addition it should be noted that money awarded to publicly funded attorneys is recycled back into the organization for which the attorney works to expand services to low income individuals. Under our present system, offices which provide legal assistance to the poor encounter an overwhelming demand for their services, and unfortunately have very limited resources to meet this demand. So, it is our feeling that any additional funds made available to expand legal services to our nation's poor citizens is money well spent.

Further, the cap on publicly funded attorneys' fees would deter institutions from settling cases expeditiously. Institutions not faced with having to pay more substantial attorneys' fees at the fair market rate will have an incentive to draw judicial proceedings out in an attempt to force plaintiffs to abandon their cases.

This legislation is designed to protect the rights of mentally ill persons, including their rights to access the courts. In essence, by limiting the attorneys' fees for those who represent the poor, we

are ultimately limiting the rights of poor people who are mentally ill and abused, or their guardians. Consequently, we believe that by maintaining this provision in the bill an unfair double standard will be set.

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